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No. 88-1482

In The

Supreme Court of the United States

October Term, 1989

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,

Petitioner,

vs.

ANR PIPELINE COMPANY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENTS, ANR PIPELINE COMPANY, COLORADO INTERSTATE GAS COMPANY, COLUMBIA GAS TRANSMISSION CORP., KN ENERGY, INC., NATURAL GAS PIPELINE COMPANY OF AMERICA AND TENNESSEE GAS PIPELINE CO., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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April 7, 1989

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QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals correctly applied the Supreme Court's previous decisions in holding that Oklahoma is pre-empted under the Natural Gas Act of 1938 and the Natural Gas Policy Act of 1978 from regulating interstate pipelines under the ratable take statute, Okla. Stat. tit. 52 § 240 (1981), and the implementing rule, Rule 1-305 of the Corporation Commission of the State of Oklahoma.

PARTIES

These respondents' parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates are listed below.

ANR Pipeline Company—
The Coastal Corporation, Colorado Interstate Corporation and Colorado Interstate Gas Company

Colorado Interstate Gas Company—
The Coastal Corporation, Colorado Interstate Corporation and ANR Pipeline Company

Columbia Gas Transmission Corp.—
The Columbia Gas System, Inc.

K N Energy, Inc.—
None

Natural Gas Pipeline Company of America—
United Energy Resources, Inc., MidCon Corp., Occidental Petroleum Corporation, Church & Dwight Co., Inc., Energy America Incorporated IBP, Inc., IBP International, Inc., Sheridan Enterprises, Inc., Carbocloro S.A. Industries Quimicas, Sanital Comercio e Empreendimentos Ltda., Ftaliquimica S.A., Malharia Industrial do Nordeste S.A., Vinor Vinilicos do Nordeste Ltda., Industria Oxy S.A. de C.V., Sumitomo Durez Co., Ltd., Diamond Shamrock Chemicals Company Pty. Limited, Canadian Occidental Petroleum Ltd., International Ore & Fertilizer Belgium, S.A., International Ore & Fertilizer S.p.A., Industria Quimica de Portuguesa, S.A., Mississippi Chemical Corporation, Tororo Industrial Chemicals and Fertilizers Limited, Occidental Chemical China Limited, Occidental Chemical Far East Limited, Occidental Chemical Chile

S.A.I., Thai Occidental Chemical Ltd., Thai Diamond Shamrock Ltd., Trans-Jeff Chemical Corporation, Oxy Metal Industries (France) S.A., OXYTECH Systems, Inc., Plastiflex, C.A., Island Creek of China Coal Ltd., O-K Investment Company Ltd., Minera Azteca, S.A. de C.V., Occidental Minerals (Philippines), Inc., C-D Development Corporation, Newco Holding Corporation, Citco Amazonas Petroleo Ltda., Cico Barreirinhas Petroleo do Brasil Ltrda., Citco Rio Petroleo Ltda., Citco Union Texas Petroleo do Brasil Ltda., East Texas Sale Water Disposal Company, Dixie Pipeline Company, Repsol Occidental Corporation, 602 Operating Corporation, Hispano Inversion, S.A., Occidental de Espana, S.A., Oil Casualty Insurance, Ltd., Oil Insurance Limited, Petway Products Distributors, Inc., Excel de Mexico, S.A. de C.V., Hybrid Rice, Inc., RAMM Hybrids, Inc., RAMM Hybrids International, Inc., Carter Day Industries, Inc. and Eko Hotels Limited

Tennessee Gas Pipeline Company of America—

Tenneco, Inc., Case Poclain S.A. (France), J.I. Case SpA (Italy), Kern River Gas Supply Corporation (Delaware), Kern River Service Corporation (Delaware), Tenneco Automotive Foreign Sales Corporation Limited (Jamaica), Consolidated Diesel Company (North Carolina Partnership), Hay & Forage Industries (Kansas Partnership), Tenneco Canada Inc. (Ontario), Monroe Auto Pecas S.A. (Brazil), Poclain do Brasil S.A. (Brazil), P.P.M. Guindastes Hidraulicos S.A. (Brazil), Tenneco Deutschland Beteiligungs GmbH (Germany), Alcan Ekco Limited (United Kingdom), A/S Haustrup-Ekco Aluminium-Emballage (Denmark), Ekco S.A.R.L. (France), Skogstre A/S (Norway), Toyo Ekco Company, Ltd (Toyo Ekco Kubushiki, Kaisha) (Japan), TENN-USS Chemicals Finance Corporation (Delaware), Tenneco Oil Company of Nigeria Unlimited (Nigeria), Tenngasco Gas Gathering Company (Delaware - in dissolution), HT Gathering Company (Texas),

Oasis Pipeline Company (Delaware), Walker Deutschland BmbH (Germany), Sara Gretes Cafeteria AB (Sweden), Case Poclain S.A., Omni-Pac GmbH (Germany), Omni-Pac S.A.R.L. (France), Poclain do Brasil S.A. (Brazil), S.A. Paper Chemicals (pty), Limited (South America), Case Vibromax GmbH und Co. (Germany), Vibromax France SARL (France), Vibromax SCI (France), Case Poclain GmbH & Co. (Germany), Walker Deutschland GmbH (Germany), Sperry Marine Limited (United Kingdom), Albright & Wilson Asia Taiwan Limited (Taiwan), Albright & Wilson (Australia) Limited (Australia), Albright & Wilson New Zealand Limited (New Zealand, Akulu Marchon (PTY) Ltd. (South Africa), Akulu Chemicals Coast (PTY) Limited (South Africa), Akulu Chemicals (PTY) Ltd. (South Africa), Polyphosphates Inc. (Philippines), Albright, Morarji and Pandit Limited (India), Specialty Phosphates (Malaysia) SDN BHD (Malaysia), Tenneco Canada Inc. (Ontario), and Intertractor Viehmann GmbH & Co. (Germany)

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The Respondents, ANR Pipeline Company, Colorado Interstate Gas Company, Columbia Gas Transmission Corp., KN Energy, Inc., Natural Gas Pipeline Company of America and Tennessee Gas Pipeline Co., object to the Petitioner's Petition for a Writ of Certiorari.

STATUTES INVOLVED

See Appendix D to the Corporation Commission's Petition. In addition, attached hereto as Appendix A is Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b); and Okla. Stat. tit. 52 § 102.

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STATEMENT OF FACTS

On October 19, 1983, the Corporation Commission issued Rule 1-305 which purported to require any common purchaser, as defined in Okla. Stat. tit. 52 § 240, to purchase all gas which is offered for sale, and which may be reasonably reached by its trunk or gathering lines, without discrimination in favor of one producer as against another or in favor of any one source of supply as against another. Rule 1-305 also contains a priority scheme which the purchaser is to follow in reducing purchases when the permitted production from wells from which a purchaser is required to take exceeds the purchaser's market demand.

Thereafter, producers of natural gas in Oklahoma filed applications with the Corporation Commission seeking orders requiring interstate pipelines to purchase ratably, purportedly in accordance with Okla. Stat. tit. 52 § 240 and Rule 1-305. On February 27, 1984, the Corporation Commission ordered that the pending proceedings be consolidated for the purpose of hearing arguments as to whether the Commission had jurisdiction to regulate interstate pipeline purchases. The Commission then issued Order No. 281285 on July 3, 1985 holding that

the Commission did have jurisdiction to regulate the purchase of natural gas by interstate pipeline companies.

Respondents then filed for declaratory and injunctive relief in the United States District Court for the Western District of Oklahoma to prohibit the Corporation Commission from asserting jurisdiction over interstate pipeline purchasers under Okla. Stat. tit. 52 § 240 and Rule 1-305. The District Court granted the requested relief, holding that the cases of *Northern Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84 (1963) (*"Northern Natural"*), and *Transcontinental Gas Pipe Line Corp. v. State Oil & Bas Bd. of Miss.*, 474 U.S. 409 (1986) (*"Transco"*), controlled, and that Okla. Stat. tit. 52 § 240 and Rule 1-305, as applied to interstate pipelines, interfere with and are pre-empted by the federal regulatory scheme established by the Natural Gas Act, 15 U.S.C. § 717 *et seq.* ("NGA") and the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 et seq. ("NGPA").

The Corporation Commission appealed this decision to the Tenth Circuit Court of Appeals, which affirmed the District Court's decision and order on November 9, 1988. The Corporation Commission then filed its Petition asking this Court to review the Tenth Circuit decision. On March 27, 1989, the Corporation Commission filed a Supplemental Brief.

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SUMMARY OF REASONS FOR DENYING THE PETITION

The Tenth Circuit correctly applied previous decisions by this Court in finding that Oklahoma is pre-empted under the NGA and NGPA from attempting to regulate directly interstate pipeline companies and their purchases of natural gas through a ratable take statute and regulation. This Court's recent decision on the issue of federal pre-emption further supports the Tenth Circuit's opinion at issue here. This matter being well settled, there is no reason to grant the Petition for writ of certiorari.

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REASONS FOR DENYING THE PETITION

The Corporation Commission's Petition for a writ of certiorari should be denied. The District Court and Tenth Circuit both fully reviewed the arguments presented by the Corporation Commission below. These courts correctly determined that this Court's decisions in *Northern Natural* and *Transco* are controlling and that Oklahoma may not attempt to regulate interstate pipeline purchasers under Okla. Stat. Ann. tit. 52 § 240 or Rule 1-305. Moreover, despite the Corporation Commission's assertions to the contrary, the Tenth Circuit's decision is fully consistent with and supported by this Court's recent decision in *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas,* No. 86-1856, 57 U.S.L.W. 4302 (U.S. March 6, 1989) (*"Northwest Central"*). The question presented in this case is well settled. There is no reason for the Court to grant certiorari.

At issue here is whether the Corporation Commission, acting pursuant to Okla. Stat. tit. 52 § 240 and Rule 1-305, may require interstate pipelines to purchase gas ratably from the production available and within the priorities set forth in Rule 1-305. A failure to comply with Rule 1-305 could subject the purchasers to a $5,000 per day fine under Okla. Stat. tit. 52 § 102. *Northern Natural* and *Transco,* under virtually identical circumstances, clearly hold that state regulation of purchases directed at interstate pipelines is pre-empted under the NGA and the NGPA.

In those cases, the states attempted to enforce ratable take statutes and orders against interstate pipelines under the guise of the states' authority to regulate production. The Corporation Commission similarly argues in its Petition, as it so argued before the District Court and Tenth Circuit, that it is merely attempting to regulate production by attempting to require interstate pipelines to purchase ratably within a specified priority scheme. The Tenth Circuit correctly applied the reasoning of *Northern Natural* and *Transco* in rejecting such an argument. Identical to the statutes and orders at issue in those cases, both Okla. Stat. tit. 52 § 240 and Rule 1-305 are directed solely toward purchasers, not producers.

Despite the Corporation Commission's claims to the contrary, the decision in *Northwest Central* fully supports the District Court's and Tenth Circuit Court's decision in this case. In *Northwest Central* this Court was careful to distinguish upholding a state regulation directed at pro-

ducers and production from the impermissible direct regulation of interstate pipeline purchasers struck down by the Tenth Circuit in this case and by this Court in *Northern Natural* and *Transco*. As noted by this Court, the regulation upheld in *Northwest Central* imposes no purchasing requirements on pipelines. In contrast, "[i]n both *Northern Natural* and *Transco*, States had crossed the dividing line so carefully drawn by Congress in NGA § 1(b) and retained in the NGPA, trespassing on federal territory by imposing purchasing requirements on interstate pipelines." *Northwest Central*, slip op. at 18, 57 U.S.L.W. at 4308. Similarly, here the Corporation Commission is crossing the dividing line by attempting to regulate interstate pipeline purchasers.

Northwest Central reaffirms the decision in *Northern Natural* and *Transco* and presents a situation readily distinguishable from that in this case. No purpose would be served by remanding this case back to the Tenth Circuit for reconsideration in light of *Northwest Central*. To the contrary, in light of this Court's decision in *Northwest Central*, it is clear that the Tenth Circuit's decision in this case is totally consistent with and controlled by this Court's decision in *Northern Natural* and *Transco*.

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CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 7, 1989

APPENDIX A

Natural Gas Act, 15 U.S.C. § 717. Necessity for regulation of natural gas companies

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Okla. Stat. tit. 52 § 102. Contempt—Punishment—Enforcement of fines—Disposition of fines and penalties

Punishment for contempt by the Commission of any person, guilty of any disrespectful or disorderly conduct in the presence of the Commission while in session, or for disobedience of its subpoena, summons or other process, may be by fine not exceeding One Thousand Dollars ($1,000.00) or by confinement in the county jail of Oklahoma County not exceeding one (1) year, or by both. Any person who shall disobey or violate any of the provisions of Section 86.1 et seq. of this title or any of the orders, rules, regulations or judgments of the Commission issued, promulgated or rendered by it, shall be punished as for contempt. Punishment by the Commission in proceedings as for contempt for disobedience or violation of any provision of Section 86.1 et seq. of this title or any of its orders, rules, regulations or judgments, issued, promul-

gated or rendered under the provisions of Section 86.1 et seq. of this title shall be by fine not exceeding in amount Five Thousand Dollars ($5,000.00), and each day such disobedience or violation shall continue shall constitute a separate and additional contempt, and shall be punished by separate and additional fines each in amount not in excess of aforesaid amount. Any fine or penalty assessed under the provisions of Section 86.1 et seq. of this title shall constitute and be a lien upon all the property of the offender within the state, except the homestead of such offender, provided that, before any such fine or penalty shall become a lien upon any property of the offender as against third persons, a copy of the order or judgment of the Commission assessing such fine or penalty, certified by the Secretary of the Commission, shall be filed in the office of the court clerk of the county wherein any such property of the offender is located, and entered on the judgment docket of said court. If any such fine shall not be paid to the Commission within thirty (30) days after the order or judgment of the Commission imposing the same, the Commission shall issue an execution directed to the Director of Conservation commanding him to seize sufficient property of the offender to satisfy said fine; and it shall be the duty of the Director of Conservation to levy upon any property of the offender found within the state, and to sell and dispose of the same in like manner as now provided and required of sheriffs in this state in the levy upon and sale of property under an execution upon a judgment of a district court of the state, and all costs incurred in the issuance, execution and sale under such levy shall be taxed against the defendant and collected in the same manner provided herein for the col-

lection of such fine. All monies collected as fines or penalties under the provisions of Section 86.1 et seq. of this title shall, when paid into or received by the Commission, be by it paid to the State Treasurer of the state for the credit of the Corporation Commission Revolving Fund.

Amended by Laws 1975, c. 285, § 5, emerg. eff. June 5, 1975; Laws 1984, c. 284, § 16, operative July 1, 1984.